



Commonwealth of Massachusetts State Ethics Commission

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SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 417

IN THE MATTER OF RICHARD BURGESS

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Richard Burgess (Mr. Burgess) pursuant to §5 of the Commission's **Enforcement Procedures**. This Agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j).

On January 24, 1990, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a Preliminary Inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Mr. Burgess. The Commission has concluded that inquiry and, on November 14, 1990, found reasonable cause to believe that Mr. Burgess violated G.L. c. 268A, §19.

The Commission and Mr. Burgess now agree to the following facts and conclusions of law:

1. At all times material herein, Mr. Burgess was a member of the Swansea Planning Board, and its chairman since 1985. As such, he was a municipal employee within the meaning of G.L. c. 268A, §1.

2. Among his responsibilities as a planning board member was the review and approval of subdivision plans pursuant to G.L. c. 41, §81. That process involved the planning board first accepting the plan (which set in motion certain time periods for approval), having a public hearing, approving or disapproving the plan, and ultimately endorsing the plan with respect to the question of whether the construction of roads and installation of utilities was adequately secured by an appropriate surety or bond. The planning board would also be called on to review and approve certain so-called "approval not

required" (ANR) plans where the only role of the board was to determine that each lot shown on the plan had adequate frontage on an approved way.

3. Beginning in or about April 1986, Mr. Burgess became associated as a real estate agent with Michael McNally (McNally), the sole proprietor of M.J. McNally and Associates of Fall River. McNally did not compensate Burgess as a conventional employee, rather he treated him as an independent contractor. Under this arrangement, McNally's agency would receive the sales commissions for those sales made by Burgess, and then compensate Burgess with 50% of those commissions. McNally lists and sells real estate in the Swansea, Fall River, Freetown, and Berkeley areas.^{1/}

I. Cheryl Drive

4. On February 23, 1987, McNally sold a certain piece of raw land in Swansea to Dillon Lane Construction.

5. Mr. Burgess was aware of the above sale. He also knew that under normal trade practice whenever a realtor sold raw land to a developer, if that land was later developed as a subdivision, it was reasonably foreseeable that the realtor would be the broker regarding the sale of the individual lots.

6. On April 21, 1987, Dillon Lane Construction filed a subdivision plan (Cheryl Drive Subdivision) regarding the foregoing raw land.

7. McNally had Cheryl Drive Subdivision lots under purchase and sale agreements as follows: two of the lots on May 22, 1987, and one additional lot on May 26, 1987; June 16, 1987; August 6, 1987; and August 21, 1987. Each lot sold for approximately \$50,000. According to the purchase and sales agreements, McNally would receive a total of \$23,200 in commissions for the sales of these lots. All purchase and sale agreements were contingent upon the approval of the subdivision plan by the planning board. (Mr. Burgess did not act as an agent for the Cheryl Drive Subdivision and received no commissions for the sales of the subdivision's lots).

8. On June 8, 1987, Mr. Burgess, as a planning board member, along with two other planning board members, conducted the required public hearing regarding the Cheryl Drive Subdivision plan. On June 15, 1987 and on July 20, 1987, respectively, Mr. Burgess with two other members voted to approve and then endorse the Cheryl Drive Subdivision plan. (A quorum of three members is required to vote on planning board business.) At this time, there were four active members on the planning board.^{2/} One active member, Steven Torres, was not present for the June 8, 1987 and July 20, 1987 meetings.^{3/} (No board member, present or absent, ever sought to disqualify himself from the Cheryl Drive matters).

9. Section 19 of G.L. c. 268A provides in relevant part that except as otherwise permitted in that section,^{4/} a municipal employee is prohibited from participating^{5/} in a particular matter^{6/} in which a business organization by which he is employed has a financial interest.^{7/}

10. The decisions to approve and endorse the Cheryl Drive Subdivision plan were particular matters.

11. Mr. Burgess participated in these particular matters by conducting the June 8, 1987 public hearing and by voting to approve and then endorse the plan on June 15, 1987 and July 20, 1987, respectively.

12. When he acted as described above, Mr. Burgess knew that McNally had a financial interest in those particular matters inasmuch as he knew that McNally would be selling the lots in the subdivision which was the subject of those particular matters, and that their sale was contingent on planning board approval. Indeed, by the June 8, 1987 public hearing, McNally already had several lots under agreement.

13. McNally, as a sole proprietor, is a business organization for purposes of §19.

14. By participating in these various Cheryl Drive Subdivision decisions in which he knew McNally had a financial interest, Mr. Burgess participated in particular matters in which he knew a business organization by which he was employed^{8/} had a financial interest, thereby violating §19.

II. Warhurst Park

15. On June 27, 1986, Mr. Burgess, as McNally's agent, sold certain raw land known as Warhurst Park to P&H, Inc. Mr. Burgess knew that P&H's owners intended to develop the land for a subdivision. He also knew that being the real estate agent who sold the raw

property to P&H, it was reasonably foreseeable he would have the opportunity to sell the individual lots if and when they were developed as part of the subdivision.

16. On June 15, 1987, P&H filed a subdivision plan for Warhurst Park with the planning board. Mr. Burgess abstained at that meeting from the vote to accept the filing of the plan because of his financial interest in the eventual sale of the lots in that proposed subdivision.^{9/}

17. Ultimately, Mr. Burgess did sell 15 of the 16 lots in the Warhurst Park Subdivision, earning \$24,984.00 in commissions.

18. The purchase and sale agreements were contingent on planning board approval.

19. On July 20, 1987, Mr. Burgess, along with two other planning board members, conducted the required public hearing as to the Warhurst Park Subdivision. Thereafter, on October 26, 1987, Mr. Burgess voted as a planning board member to approve modifications to the Warhurst Park plan. (Absent the board's October 26, 1987 vote, it is likely the Warhurst subdivision plan would have been constructively approved on October 28, 1987^{10/}).

20. The decision to approve the Warhurst Park Subdivision modifications was a particular matter.

21. Mr. Burgess participated in this particular matter by attending the public hearing and by voting to approve the plan modifications.

22. Mr. Burgess knew that he had a personal financial interest as the real estate agent regarding these lots when he so participated, in that the purchase and sales agreements were contingent on planning board approval. (At the July 20, 1987 hearing, Mr. Burgess disclosed this financial interest).

23. By participating as a planning board member in decisions affecting the Warhurst Park Subdivision at a time when he knew he was likely to receive a future financial interest from those decisions, Mr. Burgess participated in particular matters in which he had a financial interest, thereby violating §19.

24. By way of defense, Mr. Burgess contends that the Rule of Necessity should apply to his participating in the Cheryl Drive and Warhurst Park particular matters. He contends that at the time he took each of the actions described above, there were only three planning board members present. Consequently, in order to create the required quorum of three so that the board could act, he invoked the Rule of Necessity which, in his view, allows a board member who has a conflict to participate if his participation is necessary to create a quorum. Moreover, Assistant Town Counsel, Kevin Waldron, was present at the July 20, 1987 meeting and did not object to Burgess' participation.

25. Two responses are in order. First, Mr. Burgess did not, in fact, explicitly invoke the necessity rule on any of the above-described occasions, except as to his July 20, 1987 participation in the public hearing on the Warhurst Park subdivision matter. Second, Mr. Burgess' basic premise — that the Rule of Necessity may be invoked to create a quorum — is not correct as applied to these facts. The rule cannot be invoked where the mere absence of a member prevents a quorum. *See, Graham v. McGrail*, 370 Mass. 133, 138 (1976); *Commission Fact Sheet, Rule of Necessity*. Efforts must be made to reschedule the matter so that a quorum of members (without conflicts) can be obtained.^{11/}

26. In participating in the Cheryl Drive and Warhurst Park matters, Mr. Burgess' purpose appears to have been to facilitate town business by providing a quorum. Thus, the evidence suggests Mr. Burgess' violation of G.L. c. 268A, §19 was unintentional.^{12/}

III. ANR Plan

27. On August 21, 1986, McNally and Charles Baldwin entered into a purchase and sale agreement to buy a certain parcel of property on Route 6 and Old Fall River Road, Swansea. They arranged this purchase using Charles Baldwin's spouse, Patricia Baldwin, as the nominal purchaser.

28. On November 17, 1986, an ANR plan was submitted to the planning board by which the above parcel would be divided into three separate lots. On that same date, the planning board, with Burgess participating, voted to approve the ANR plan.

29. The division of the parcel into three lots would make the parcel more valuable.

30. Mr. Burgess knew that McNally and Charles Baldwin had this property under agreement at the time he so voted.

31. The decision to approve the ANR plan was a particular matter.

32. Mr. Burgess participated in the above ANR decision by voting to approve the application.

33. When he so voted, he knew that McNally had a financial interest in the vote in that McNally, along with Baldwin, had signed a purchase and sale agreement to buy the property.

34. By approving the ANR plan at a time when he knew McNally had a financial interest in the decision, Mr. Burgess participated in a particular matter in which he knew a business organization by which he was associated had a financial interest, thereby violating §19.

Based on the foregoing, the Commission has determined that the public interest would be served by the disposition of this matter without further Commission enforcement proceedings on the basis of the following terms, to which Mr. Burgess has agreed:

1. that he pay the Commission a sum of five hundred dollars (\$500.00)^{13/} forthwith for violating G.L. c. 268A, §19; and

2. that he waive all rights to contest the findings of fact, conclusions of law, and conditions contained in the agreement in this or any related administrative or judicial proceeding to which the Commission is a party.

Date: March 24, 1992

^{1/}Before joining McNally Associates, Burgess sought advice on potential employment conflicts with his planning board duties from assistant town counsel, Kevin Waldron. Waldron orally advised Burgess to avoid participating in planning board matters that affected his financial interest, his family's financial interest, and the financial interest of businesses he owned or managed. Only written legal advice, however, made a matter of public record and filed with the Commission constitutes a valid conflict of interest defense. See, G.L. c. 268A, §22; *In re Lavoie*, 1987 SEC 286; *In re Deleire*, 1985 SEC 236.

^{2/}After March 24, 1986, a fifth member, Brian Gingras, rarely attended meetings.

^{3/}Torres attended meetings on June 15, 1987, June 22, 1987, June 29, 1987, July 7, 1987 and July 13, 1987.

^{4/}None of the exceptions apply here.

^{5/}"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

^{6/}"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

^{7/}The term "financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See, *Graham v. McGrail*, 379 Mass. 133, 138-39 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See, *EC-COI-84-98*. The interest can be affected in either a positive or a negative way. See, *EC-COI-84-86*. Burgess was unaware of *Graham*.

^{8/}Mr. Burgess argued that on these facts he was not employed by McNally, rather his relationship was that of an independent contractor. The Commission, however, will construe the term "employed" broadly so as to include independent contractor relationships where a significant portion of the subject's annual compensation as an independent contractor is derived from that relationship. See, *EC-COI-83-34* (portion of income earned from business organization and time spent serving organization determining factors whether official is "employee"). Here, virtually all of Mr. Burgess' annual income was received from McNally.

^{9/}As of June 15, 1987, Mr. Burgess, through McNally, had 10 such lots under purchase and sale agreements.

^{10/}G.L. c. 41, §8U provides in relevant part, "the failure of a planning board either to take final action or to file with the city or town clerk a certificate of such action regarding the definitive plan submitted by an applicant within one hundred thirty-five days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof." The Warhurst Subdivision plan was submitted on June 15, 1987.

^{11/}In fact, Burgess need only have waited less than forty minutes for the tardy Torres to appear on June 15, 1988 to have obtained a quorum of members without conflicts to vote on the Cheryl Drive Subdivision. At that time, Burgess did not know when Torres would arrive.

In the case of the October 26, 1988 meeting, an effort to reschedule would have been futile due to public meeting notice requirements

and the imminent constructive approval on October 28, 1987.

¹²Ignorance of the law is no defense to the conflict of interest law. *In re Doyle*, 1980 SEC 11, 13, *See also, Scola v. Scola*, 318 Mass. 1, 7 (1945).

¹³Pursuant to G.L. c. 268B, §3, the Commission is authorized to impose a fine of up to \$2,000 for each violation of G.L. c. 268A. Here, the Commission has imposed only \$500 because it found substantially mitigating Mr. Burgess' assertions that in the majority of the instances where he participated, he believed his involvement was necessary in order to establish a quorum so the board could act, and that before starting as a real estate agent he sought advice from town counsel in an attempt to avoid violations.